

individual minimum capital requirement should be established for the savings association, or whether that proposed requirement should be adopted in modified form, based on a review of the savings association's response and other relevant information. The OTS's decision shall address comments received within the response period from the savings association and the appropriate state supervisor (if a state-chartered savings association is involved) and shall state the level of capital required, the schedule for compliance with this requirement, and any specific remedial action the savings association could take to eliminate the need for continued applicability of the individual minimum capital requirement. The OTS shall provide the savings association and the appropriate state supervisor (if a state-chartered savings association is involved) with a written decision on the individual minimum capital requirement, addressing the substantive comments made by the savings association and setting forth the decision and the basis for that decision. Upon receipt of this decision by the savings association, the individual minimum capital requirement becomes effective and binding upon the savings association. This decision represents final agency action.

(4) *Failure to comply.* Failure to satisfy an individual minimum capital requirement, or to meet any required incremental additions to capital under a schedule for compliance with such an individual minimum capital requirement, shall constitute a legal basis for issuing a capital directive pursuant to § 567.4 of this part.

(5) *Change in circumstances.* If, after a decision is made under paragraph (d)(3) of this section, there is a change in the circumstances affecting the savings association's capital adequacy or its ability to reach its required minimum capital level by the specified date, OTS may amend the individual minimum capital requirement or the savings association's schedule for such compliance. The OTS may decline to consider a savings association's request for such changes that are not based on a significant change in circumstances or that are repetitive or frivolous. Pending the OTS's reexamination of the original

decision, that original decision and any compliance schedule established thereunder shall continue in full force and effect.

[54 FR 49649, Nov. 30, 1989, as amended at 55 FR 13516, Apr. 11, 1990; 57 FR 14335, 14348, Apr. 20, 1992; 59 FR 64564, Dec. 15, 1994; 60 FR 66719, Dec. 26, 1995]

§ 567.4 Capital directives.

(a) *Issuance of a Capital Directive*—(1) *Purpose.* In addition to any other action authorized by law, the Office may issue a capital directive to a savings association that does not have an amount of capital satisfying its minimum capital requirement. Issuance of such a capital directive may be based on a savings association's noncompliance with a capital requirement established under § 567.2, § 567.3, by a written agreement under 12 U.S.C. 1464(s), or as a condition for approval of an application. A capital directive may order a savings association to:

- (i) Achieve its minimum capital requirement by a specified date;
- (ii) Adhere to the compliance schedule for achieving its individual minimum capital requirement;
- (iii) Submit and adhere to a capital plan acceptable to the Office describing the means and a time schedule by which the savings association shall reach its required capital level;
- (iv) Take other action, including but not limited to, reducing the savings association's assets or its rate of liability growth, or imposing restrictions on the savings association's payment of dividends, in order to cause the savings association to reach its required capital level;
- (v) Take any action authorized under § 567.10(e); or
- (vi) Take a combination of any of these actions.

A capital directive issued under this section, including a plan submitted pursuant to a capital directive, is enforceable under 12 U.S.C. 1818 in the same manner and to the same extent as an effective and outstanding cease and desist order which has become final under 12 U.S.C. 1818.

(2) *Notice of intent to issue capital directive.* The OTS will determine whether to initiate the process of issuing a capital directive. The OTS will notify a

savings association in writing by registered mail of its intention to issue a capital directive. If a state-chartered savings association is involved, the OTS will also notify and solicit comment from the appropriate state supervisor. The notice will state:

(i) The reasons for issuance of the capital directive and

(ii) The proposed contents of the capital directive.

(3) *Response to notice of intent.* (i) A savings association may respond to the notice of intent by submitting its own compliance plan, or may propose an alternative plan. The response should also include any information that the savings association wishes the OTS to consider in deciding whether to issue a capital directive. The appropriate state supervisor may also submit a response. These responses must be in writing and be delivered within 30 days after the receipt of the notices. Such responses shall be submitted in accordance with §516.1(c) of this chapter. In its discretion, the Office may extend the time period for the response for good cause. The Office may, for good cause, shorten the 30-day time period for response by the insured savings association:

(A) When, in the opinion of the Office, the condition of the savings association so requires, and the Office informs the savings association of the shortened response period in the notice;

(B) With the consent of the savings association; or

(C) When the savings association already has advised the Office that it cannot or will not achieve its applicable minimum capital requirement.

(ii) Failure to respond within 30 days of receipt, or such other time period as may be specified by the Office, may constitute a waiver of any objections to the capital directive unless the Office grants an extension of the time period for good cause.

(4) *Decision.* After the closing date of the savings association's response period, or upon receipt of the savings association's response, if earlier, the Office shall consider the savings association's response and may seek additional information or clarification of the response. Thereafter, the Office will determine whether or not to issue

a capital directive and, if one is to be issued, whether it should be as originally proposed or in modified form.

(5) *Service and effectiveness.* (i) Upon issuance, a capital directive will be served upon the savings association. It will include or be accompanied by a statement of reasons for its issuance and shall address the responses received during the response period.

(ii) A capital directive shall become effective upon the expiration of 30 days after service upon the savings association, unless the Office determines that a shorter effective period is necessary either on account of the public interest or in order to achieve the capital directive's purpose. If the savings association has consented to issuance of the capital directive, it may become effective immediately. A capital directive shall remain in effect and enforceable unless, and then only to the extent that, it is stayed, modified, or terminated by the Office.

(6) *Change in circumstances.* Upon a change in circumstances, a savings association may submit a request to the OTS to reconsider the terms of the capital directive or consider changes in the savings association's capital plan issued under a directive for the savings association to achieve its minimum capital requirement. If the OTS believes such a change is warranted, the OTS may modify the savings association's capital requirement or may refuse to make such modification if it determines that there are not significant changes in circumstances. Pending a decision on reconsideration, the capital directive and capital plan shall continue in full force and effect.

(b) *Relation to other administrative actions.* The Office—

(1) May consider a savings association's progress in adhering to any capital plan required under this section whenever such savings association or any affiliate of such savings association (including any company which controls such savings association) seeks approval for any proposal that would have the effect of diverting earnings, diminishing capital, or otherwise impeding such savings association's progress in meeting its minimum capital requirement; and

(2) May disapprove any proposal referred to in paragraph (b)(1) of this section if the Office determines that the proposal would adversely affect the ability of the savings association on a current or pro forma basis to satisfy its capital requirement.

[54 FR 49649, Nov. 30, 1989, as amended at 55 FR 13517, Apr. 11, 1990; 57 FR 14335, Apr. 20, 1992; 57 FR 33440, July 29, 1992; 60 FR 66719, Dec. 26, 1995]

§ 567.5 Components of capital.

(a) *Core Capital.* (1) The following elements,³ less the amount of any deductions pursuant to paragraph (a)(2) of this section, comprise a savings association's core capital:

(i) Common stockholders' equity (including retained earnings);

(ii) Noncumulative perpetual preferred stock and related surplus;⁴

(iii) Minority interests in the equity accounts of subsidiaries that are fully consolidated;

(iv) Nonwithdrawable accounts and pledged deposits of mutual savings associations (excluding any treasury shares held by the savings association) meeting the criteria of regulations and memoranda of the Office to the extent that such accounts or deposits have no fixed maturity date, cannot be withdrawn at the option of the accountholder, and do not earn interest that carries over to subsequent periods;

(v) The remaining goodwill (FSLIC Capital Contributions) resulting from prior regulatory accounting practices as provided in § 567.1(w)(1) of this part.

³Stock issues where the dividend is reset periodically based on current market conditions and the savings associations's current credit rating, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to supplementary capital, regardless of cumulative or noncumulative characteristics.

⁴Stock issued by subsidiaries that may not be counted by the parent savings association on the Thrift Financial Report, likewise shall not be considered in calculating capital. For example, preferred stock issued by a savings association or a subsidiary that is, in effect, collateralized by assets of the savings association or one of its subsidiaries shall not be included in capital. Similarly, common stock with mandatorily redeemable provisions is not includable in core capital.

(2) *Deductions from core capital.* (i) Intangible assets, as defined in § 567.1(m) of this part, are deducted from assets and capital in computing core capital, except as otherwise provided by § 567.12 of this part.

(ii) Mortgage servicing rights (both originated and purchased) that are not includable in tangible and core capital pursuant to § 567.12 of this part are deducted from assets and capital in computing core capital.

(iii) [Reserved]

(iv) Investments, both equity and debt, in subsidiaries that are not includable subsidiaries (including those subsidiaries where the savings association has a minority ownership interest) are deducted from assets and, thus core capital except as provided in paragraphs (a)(2)(v) and (a)(2)(vi) of this section.

(v)(A) If a savings association has any investments (both debt and equity) in one or more subsidiaries engaged as of April 12, 1989 and continuing to be engaged in any activity that would not fall within the scope of activities in which includable subsidiaries may engage, it must deduct such investments from assets and, thus, core capital in accordance with paragraph (a)(2)(v) of this section. The savings association must first deduct from assets and, thus, core capital the amount by which any investments in such subsidiary(ies) exceed the amount of such investments held by the savings association as of April 12, 1989. Next, the savings association must deduct from assets and, thus, core capital the applicable percentage set forth in paragraph (a)(2)(v)(B) of this section of the lesser of:

(1) The savings association's investments in and extensions of credit to the subsidiary as of April 12, 1989; or

(2) The savings association's investments in and extensions of credit to the subsidiary on the date as of which the savings association's capital is being determined.

(B) For purposes of paragraph (a)(2)(v)(A) of this section, the applicable percentage is as follows:

For the period:	The applicable percentage is:
Prior to July 1, 1990	0
July 1, 1990–June 30, 1991	10